

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 02, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JULIE F.,¹

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,²
Defendant.

No. 2:21-CV-00120-SAB

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT;
DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 15, 16. The motions were heard without oral argument. Plaintiff is represented by Jaclyn Gaddy; Defendant is represented by Alexis Toma and Timothy M. Durkin.

Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision denying her application for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1382. After reviewing the administrative record

¹ Pursuant to the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021.

1 and briefs filed by the parties, the Court is now fully informed. For the reasons set
 2 forth below, the Court grants Plaintiff's Motion for Summary Judgment, ECF No.
 3 15, and denies Defendant's Motion for Summary Judgment, ECF No. 16

4 **I. Jurisdiction**

5 On July 11, 2018, Plaintiff filed an application for concurrent disability
 6 insurance and supplemental security income. She alleged disability beginning July
 7 11, 2014. At the hearing, Plaintiff amended her alleged onset date to June 6, 2017.

8 Plaintiff's application was denied initially and on reconsideration. On June
 9 3, 2019, Plaintiff requested a hearing before an Administrative Law Judge
 10 ("ALJ"). On July 24, 2020, Plaintiff appeared and testified at a telephone hearing
 11 before ALJ Jesse Shumway. Nancy Winfrey, medical expert, and Patricia Ayerza,
 12 vocational expert also participated. The ALJ issued a decision on August 14, 2020,
 13 finding that Plaintiff was not disabled.

14 Plaintiff requested review by the Appeals Council; the Appeals Council
 15 denied the request on February 3, 2021. The Appeals Council's denial of review
 16 makes the ALJ's decision the "final decision" of the Commissioner of Social
 17 Security, which this Court is permitted to review. 42 U.S.C. § 405(g),
 18 1383(c)(1)(3).

19 Plaintiff filed a timely appeal with the United States District Court for the
 20 Eastern District of Washington on March 25, 2021. ECF No. 1. The matter is
 21 before this Court pursuant to 42 U.S.C. § 405(g).

22 **II. Five-Step Sequential Evaluation Process**

23 The Social Security Act defines disability as the "inability to engage in any
 24 substantial gainful activity by reason of any medically determinable physical or
 25 mental impairment which can be expected to result in death or which has lasted or
 26 can be expected to last for a continuous period of not less than twelve months." 42
 27 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be

1 under a disability only if their impairments are of such severity that the claimant is
2 not only unable to do their previous work, but cannot, considering claimant's age,
3 education, and work experiences, engage in any other substantial gainful work that
4 exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The
5 Commissioner has established a five-step sequential evaluation process to
6 determine whether a person is disabled in the statute. See 20 C.F.R. §§
7 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v).

8 **Step One:** Is the claimant engaged in substantial gainful activities? 20
9 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work
10 done for pay and requires compensation above the statutory minimum. *Keyes v.*
11 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
12 substantial activity, benefits are denied. 20 C.F.R. § 404.1520(b), 416.920(b). If
13 the claimant is not, the ALJ proceeds to step two.

14 **Step Two:** Does the claimant have a medically-severe impairment or
15 combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A
16 severe impairment is one that lasted or must be expected to last for at least 12
17 months and must be proven through objective medical evidence. *Id.* §§ 404.1509,
18 416.909. If the claimant does not have a severe impairment or combination of
19 impairments, the disability claim is denied. *Id.* § 404.1520(a)(4)(ii),
20 416.920(a)(4)(ii). If the impairment is severe, the evaluation proceeds to the third
21 step.

22 **Step Three:** Does the claimant's impairment meet or equal one of the listed
23 impairments acknowledged by the Commissioner to be so severe as to preclude
24 substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If
25 the impairment meets or equals one of the listed impairments, the claimant is
26 conclusively presumed to be disabled. 20 C.F.R. §§ 404.1520(d), 416.920(d). If the
27 impairment is not one conclusively presumed to be disabling, the evaluation

1 proceeds to the fourth step.

2 Before considering to the fourth step, the ALJ must first determine the
3 claimant's residual functional capacity. An individual's residual functional
4 capacity is their ability to do physical and mental work activities on a sustained
5 basis despite limitations from their impairments. 20 C.F.R. §§ 404.1545(a)(1),
6 416.945(a)(1). The residual functional capacity is relevant to both the fourth and
7 fifth steps of the analysis.

8 **Step Four:** Does the impairment prevent the claimant from performing work
9 they have performed in the past? 20 C.F.R. §§ 404.1520(a)(4)(iv),
10 416.920(a)(4)(iv). If the claimant is able to perform their previous work, they are
11 not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant cannot perform
12 this work, the evaluation proceeds to the fifth and final step.

13 **Step Five:** Is the claimant able to perform other work in the national
14 economy in view of their age, education, and work experience? 20 C.F.R. §§
15 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
16 claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*
17 *v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant
18 establishes that a physical or mental impairment prevents him from engaging in her
19 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to
20 show that the claimant can perform other substantial gainful activity. *Id.*

21 **III. Standard of Review**

22 The Commissioner's determination will be set aside only when the ALJ's
23 findings are based on legal error or are not supported by substantial evidence in the
24 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
25 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
26 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
27 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial

1 evidence is “such relevant evidence as a reasonable mind might accept as adequate
2 to support a conclusion.” *Richardson*, 402 U.S. at 401.

3 A decision supported by substantial evidence will be set aside if the proper
4 legal standards were not applied in weighing the evidence and making the decision.
5 *Browner v. Sec’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
6 An ALJ is allowed “inconsequential” errors as long as they are immaterial to the
7 ultimate nondisability determination. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d
8 1050, 1055 (9th Cir. 2006). The Court must uphold the ALJ’s denial of benefits if
9 the evidence is susceptible to more than one rational interpretation, one of which
10 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d
11 1190, 1193 (9th Cir. 2004). It “must consider the entire record as a whole,
12 weighing both the evidence that supports and the evidence that detracts from the
13 Commissioner’s conclusion, and may not affirm simply by isolating a specific
14 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
15 2017) (quotation omitted). “If the evidence can support either outcome, the court
16 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

17 For claims filed on or after March 27, 2017,³ like the present claim, new
18 regulations apply regarding the evaluation of medical evidence. Revisions to Rules
19 Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017).
20 The new regulations eliminate any semblance of a hierarchy of medical opinions
21 and state that the agency does not defer to any medical opinions. 20 C.F.R.
22 §§ 404.1520c(a), 416.920c. Specifically, the rules eliminate the agency’s “treating
23 source rule,” which gave special deference to certain opinions from treating
24 sources. 82 Fed. Reg. at 5853. In articulating the ALJ’s consideration of medical

25 ³ For claims filed prior to March 27, 2017, an ALJ was to give more weight to “those
26 physicians with the most significant clinical relationship with the plaintiff.”
27 *Carmickle v. Comm’r*, 533 F.3d 1155, 1164 (9th Cir. 2008).

1 opinions for persuasiveness, the ALJ considers the following factors: (1)
 2 Supportability and (2) Consistency; (3) Relationship with the claimant, including
 3 (i) length of treatment relationship; (ii) frequency of examinations; (iii) purpose of
 4 the treatment relationship; (iv) extend of the treatment relationship; (v)
 5 examination relationship; (4) Specialization; and (5) Other factors, including
 6 whether the medical source has familiarity with the other evidence or an
 7 understanding of SSA's disability program's policies and evidentiary requirements.
 8 20 C.F.R. §§ 404.1520c(b), 416.920c(b). The most important factors in evaluating
 9 the persuasiveness of medical opinions are supportability and consistency. 20
 10 C.F.R. §§ 404.1520c(a), 416.920c(a).

11 Supportability and consistency are further explained in the regulations:

12 (1) *Supportability*.

13 The more relevant the objective medical evidence and supporting
 14 explanations presented by a medical source are to support his or her medical
 15 opinion(s) or prior administrative medical finding(s), the more persuasive
 16 the medical opinions or prior administrative medical finding(s) will be.

17 (2) *Consistency*.

18 The more consistent a medical opinion(s) or prior administrative medical
 19 finding(s) is with the evidence from other medical sources and nonmedical
 20 sources in the claim, the more persuasive the medical opinion(s) or prior
 21 administrative medical finding(s) will be.

22 20 C.F.R. §§ 404.1520c(c); 416.920c(c).

23 When a medical source provides multiple medical opinions, the ALJ must
 24 articulate how it considered these opinions in a single analysis applying the above-
 25 listed factors. 20 C.F.R. §§ 404.1520c(b)(1), 416.920c(b)(1). If equally persuasive
 26 medical opinions about the same issue are both equally well-supported and
 27 consistent with the record, but are not exactly the same, the ALJ must articulate
 28 how it considered the other most persuasive factors in making its decision. 20
 C.F.R. §§ 404.1520c(c)(3), 416.920c(c)(3).

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IV. Statement of Facts

The facts have been presented in the administrative record, the ALJ's decision, and the briefs to this Court. Only the most relevant facts are summarized herein.

At the time of the hearing, Plaintiff was 51 years old. She was the primary caregiver for her 18-year-old son. She reports that she also picks up groceries for her parents and other family members, or, more recently, has them delivered. Plaintiff experiences panic attacks roughly a couple times a week. She also has migraines that are triggered by smells, loud noises, light and changes in weather pressure. She reports that she gets migraines roughly a couple times a week as well. She has back pain and weakness in her right arm, particularly her bicep. She has previous employment as an administrative clerk at a car dealership and she also worked at a gas station.

V. The ALJ's Findings

The ALJ issued an opinion affirming denial of benefits. AR 15-26. The ALJ found that Plaintiff met the insured status requirements through June 30, 2018. At step one, the ALJ found that Plaintiff has not engaged in substantial gainful activity since June 6, 2017. AR 17.

At step two, the ALJ identified the following severe impairments: major depressive disorder; panic disorder; post-traumatic stress disorder; multi-level degenerative disc disease; obesity; degenerative joint disease and SLAP tear in the right shoulder, status post arthroscopy; and migraines. AR 17.

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. AR 18. Specifically, the ALJ found that Plaintiff did not meet the listing 1.02, 1.04, 11.02, 12.04, 12.06, and 12.15. Ultimately, the ALJ concluded that Plaintiff has a residual function capacity ("RFC") to perform:

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a full range of light work as defined in 20 CFR 404.1567(b) and 416.967(b), except: she can only occasionally climb ladders, ropes, and scaffolds; she can frequently reach with the right upper extremity; she is limited to moderate noise exposure; she can have no exposure to pulmonary irritants, extreme cold, extreme heat, or hazards such as unprotected heights or moving mechanical parts; she is limited to simple and routine tasks; she can have no contact with the public; and she needs a work environment that is not in a tightly confined space, and in which there is always a clear exit.

AR at 20.

At step four, the ALJ found that Plaintiff had past relevant work as a car dealership administrative clerk, but that this job exceeded Plaintiff's current residual functional capacity and therefore, Plaintiff was unable to perform past relevant work. AR 24.

At step five, the ALJ found that Plaintiff was not disabled and capable of performing work that exists in significant numbers in the national economy, including office helper, routing clerk, or a mail clerk. AR 25.

Issues for Review

(1) Whether the ALJ erred in conducting the Step Three analysis?

VII. Discussion

Plaintiff asserts the ALJ erred in conducting its analysis at Step Three.

At step three of the decision-making process, the regulations apply a conclusive presumption that the claimant is disabled if the ALJ determines that the claimant's impairment is equivalent to "one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity." *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987); 20 C.F.R. §§ 404.1520(d), 416.920(d). The criteria necessary to establish the presumptively disabling impairments are enumerated in the Listing of Impairments. The claimant has the burden of proving that his impairment satisfies or equals each criterion for a listed impairment based on medical evidence. *Sullivan v. Zebley*, 493 U.S. 521, 530–532

1 (1990).

2 An ALJ must adequately explain a conclusion that an impairment does not
3 meet or equal a Listing. In “determining whether a combination of impairments
4 establishes equivalence” under step three of the Listings, a mere statement that a
5 claimant did not equal the listing not sufficient. *Marcia v. Sullivan*, 900 F.2d 172,
6 176 (9th Cir. 1990)) (holding boilerplate finding is insufficient to conclude
7 impairment does not meet a Listing).

8 Plaintiff argues the ALJ failed to properly assess her migraines under Listing
9 11.02B. Listing 11.02 covers epilepsy, which is recognized by the Social Security
10 Administration as the most analogous impairment to headache disorders, such as
11 migraines. SSR 19-4p, 2019 WL 4169635, at *7. Paragraph B of Listing 11.02
12 requires documentation with a detailed description of a typical seizure (or
13 equivalent for migraines), occurring at least once a week for at least three
14 consecutive months despite adherence to prescribed treatment. 20 C.F.R. Pt. 404,
15 Subpt. P, App.1 § 11.02B.⁴ The policy interpretation regarding Listing 11.02B
16 includes additional factors an ALJ may consider when evaluating a claimant’s
17 migraines, such as: whether there are detailed descriptions from an acceptable
18 medical source of the headache event (for example, premonitory symptoms, aura,
19 duration, intensity, and accompanying symptoms); the frequency of the headaches;
20 adherence to prescribed treatment and any side effects (for example, drowsiness,
21 confusion, or inattention caused by the medication); and whether the claimant

22

⁴11.02 Epilepsy, documented by a detailed description of a typical seizure and
23 characterized by A, B, C, or D:

24 B. Dyscognitive seizures (see 11.00H1b), occurring at least once a week for
25 at least 3 consecutive months (see 11.00H4) despite adherence to prescribed
26 treatment (see 11.00C).

27 20 C.F.R. Pt. 404, Subpt. P, App.1 § 11.02B.

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1 experiences any limitations in functioning (for example, the need for a dark and
 2 quiet room, having to lie still, sleep disturbances, or other related limitations). SSR
 3 19-4p, 2019 WL 4169635, at *7.

4 The considerations under Listing 11.02D⁵ are the same as 11.02B, but also
 5 include whether the overall effects of the headache disorder result in limitations to:
 6 physical functioning; understanding, remembering, or applying information;
 7 interacting with others; concentrating, persisting, or maintaining pace; or adapting
 8 or managing oneself. *Id.*

9 Here, the ALJ simply provided boilerplate language in concluding that
 10 Plaintiff did not meet the listing for 11.02:

11 Under listing 11.02, the claimant must have convulsive epilepsy
 12 documented by a detailed description of a typical seizure pattern,
 13 occurring more than once a month in spite of at least three months of
 14 prescribed treatment, and accompanied with daytime episodes or
 15 nocturnal episodes manifesting residuals, which interfere significantly
 with activity during the day.

AR 18.

16 This is not sufficient under Ninth Circuit precedent. Not only did the ALJ
 17 rely on an outdated Listing, but it also failed to refer to SSR 19-4p, the most recent
 18

19 ⁵ D. Dyscognitive seizures (see 11.00H1b), occurring at least once every 2 weeks
 20 for at least 3 consecutive months (see 11.00H4) despite adherence to prescribed
 21 treatment (see 11.00C); and a marked limitation in one of the following:

- 22 1. Physical functioning (see 11.00G3a); or
- 23 2. Understanding, remembering, or applying information (see 11.00G3b(i)); or
- 24 3. Interacting with others (see 11.00G3b(ii)); or
- 25 4. Concentrating, persisting, or maintaining pace (see 11.00G3b(iii)); or
- 26 5. Adapting or managing oneself (see 11.00G3b(iv)).

27 20 C.F.R. Pt. 404, Subpt. P, App.1 § 11.02D.

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1 policy interpretation that provides guidance to ALJ's when assessing a claimant's
2 diagnosis of migraines.

3 As such, remand is necessary for the ALJ to properly consider whether
4 Plaintiff meets Listing 11.02.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is
7 **GRANTED.**

8 2. Defendant's Motion for Summary Judgment, ECF No. 16, is
9 **DENIED.**

10 3. The decision of the Commissioner is **REVERSED** and **REMANDED**
11 for proceedings consistent with this Order.

12 4. Judgment shall be entered in favor of Plaintiff and against Defendant.

13 5. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the
14 District Court Executive is directed to substitute Kilolo Kijakazi for Andrew Saul.

15 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
16 file this Order, provide copies to counsel, and **close** the file.

17 **DATED** this 2nd day of December 2021.



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23 Stanley A. Bastian
24 Chief United States District Judge
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